“Court-packing” in Warsaw: The Plot Thickens

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***True democracy is not just statistical democracy*, in which anything a majority or plurality wants is legitimate for that reason, *but communal democracy*, in which majority decision is legitimate only if it is a majority within a community of equals. That means that […] political decisions must treat everyone with equal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, *now matter how numerous they are* or how much they despise his or her race or morals or way of life. (Ronald Dworkin, *A Bill of Rights for Britain*, 1990, p. 35 – 36, *my emphasis*)**

The wheels of Polish constitutional upheaval keep rolling relentlessly and in one direction – to the full dismantling and paralyzing the Constitutional Court and all it stands for. However, it is not just the tempo itself of the legislative process that is out of ordinary, but the ruthlessness with which the new majority carries out its plan. A new chapter in obliterating the Court was added on 15th of December, 2015 when the majority came forward with a draft of the amendments to the Law on the Constitutional Court. In the motives to the proposed amendments it was put bluntly: “*The proposed amendments aim to adapt the regulation now in force* (related to the functioning of the Court – T.T.K) *to the political program of the parliamentary majority”.* The draft has been already denounced by the Supreme Court in an opinion for the Sejm and by the Helsinski Foundation of Human Rights. As of this writing the Sejm “worked to perfection” by rubber-stamping the will of the ruling party without any regard to the required consultation(s) and reflection(s) which in normal circumstances would be required in order for the draft to proceed. Make no mistake though. These are not normal circumstances. This is a full-blown revolution, and its executors lose no time with constitutional subtleties.

The first chapter of this drama had been the fight about the election of five new Justices to the Constitutional Court, described in my previous blog post. As of this writing, the decision of the Court that the election of two of those Justices was indeed unconstitutional has not been published in the Journal of Laws by the government, which in itself constitutes a grave infringement of its duties. The head of the Office of the Prime Minister was very straightforward when out of the blue she said that the Court’s judgment is not good enough and was given by only five justices instead of the Full Court. This is a new twist in the *praeter*–constitutional narrative: right now the government reserves to itself the right to decide on which judgments are to be published and which are not.

Taming and packing the Court. Final act?

On 15th of December a whole new chapter in the constitutional drama has started.

Firstly, the draft stipulates that all judgments of the Court must be made by the Court sitting as the Full Court (at least 13 judges). In practice, this may and will lead to paralysis in the daily functioning of the Court. Each year, the Constitutional Court deals with a few dozen constitutional complaints and motions for constitutional review. The vast majority of such cases is examined by 3 to 5-person chambers, while the Full Court has been thus far reserved for only the most difficult and controversial cases.

Secondly, the draft requires two-thirds majority each time the Court rules on the (un)constitutionality of laws. This clearly stands at odds with the Constitution which stipulates that the Court rules by a majority of votes (art. 190 (5)). Apart from this, the importance of such unconstitutional upgrade in voting is not accidental. As consensus is difficult to come by in controversial cases, the “new” qualified majority will make it impossible for the Court to rule on such cases in reasonable time, or even at all.

Thirdly, and this is one of the most troublesome provision of the draft, article 2 introduces a peculiar version of retroactivity. It opens up for reexamination any ruling made by the Court sitting as a chamber in a case that was initiated before the entry into force of the amendments. That means an "upgrade" from the original chamber to the Court composed of 13 justices. Again the intentions are crystal clear: to call into question the two judgments made by the Court on 3rd and 9th of December.

Fourthly, the new rules on the composition of the Court will be applicable to cases currently examined by the Court. There are more than 100 pending cases before the Court, including constitutional complaints, motions for unconstitutionality and questions on constitutionality referred to the Court by ordinary judges (art. 193 of the Constitution). The Court usually takes between a year and a year and a half to rule on a case after a complaint or a motion has been filed. The changes proposed will deadlock the Court's docket and significantly extend the time needed to dispose of cases as all judges will have to sit on any one case.

Fifthly, the draft repeals important provisions of the Law on the Court and, as Helsinski Foundation rightly stated in its document criticizing the amendments, it is clear that the main rationale was simply to do as much damage as possible to the Court and its procedure. Of special importance is the removal of the selection process of the justices from the Law on the Court. The future justices will be selected in accordance with the provisions contained in the Rules of Procedure of the Sejm. In the end the Law on Polish Constitutional Court and the Court itself resemble a shelf of their former selves.

Sixthly, the draft flirts with the idea of transferring the Court's seat to another city, whatever it means. It might be as well a publicity stunt to divert the attention from the demise of the Court.

Finally and lastly – as it turns out that the amendments are not the last chapter after all. Rather they are only the prelude to a total constitutional overhaul and bid farewell to the Court as we know it. The majority has just proposed amendments to the Constitution to expand the composition of the Court to 18 justices and extinguish the term of office of the current justices. Indeed the plan is long term, detailed and executed with masterful precision.

The Court as a part of the phantom Polish state

The draft of 15th December is a classic example of *ad hoc* legislation[1] whereby the majority of the day enacts regulation to "fix" a specific problem with paying no regard to other elements of the legal system. The draft dispels any lingering doubts as to the true objective of the ruling party. The attack on the Court should surprise but few. For the PiS the Third Republic of 1989 has been deficient since the very beginning, considering it a result of a rotten compromise with the outgoing communist regime and a means of keeping the old elites alive, its democratic institutions (e.g. the Court) little more than a sham, designed to sell out the country and push the "real Poles" to the sidelines.

In 2012 Wojciech Sadurski wrote: "*the exalted position of the constitutional courts within domestic political systems is not particularly stable and cannot be taken for granted. At times for the right reasons (such as concern for the democratic legitimacy of essentially non-representative bodies), and at other times for the wrong reasons (such as the irritation felt by politicians at seeing their authoritarian tendencies curbed by independent constitutional courts), these courts have seen their position and independence occasionally reduced and challenged*"[2]. The first and only time the Court faced political onslaught in the past, beyond the one-off warnings, was during the first reign of the PiS between 2005 – 2007. In 2005 it was clearly demonstrated that PiS and its leader are strongly opposed to constitutional review *in principle*. Back then, the Court did not flinch and handed down several judgments which invalidated illiberal and undemocratic laws.

This year's attack on the Court is not premised on the dissatisfaction with the overall performance or particular decisions of the Court, but rather strikes at its very *existence*. We are not dealing with some hasty decisions of the majority being the result of the transient dissatisfaction with the Court's case law. It forms part of more larger and

sophisticated plan aimed at debilitating possible pockets of resistance, curbing democracy, the rule of law and the division of powers.

This constitutional blitzkrieg teaches us a very useful lesson on the narrow understanding of democracy that is still prevalent in post-transitional Poland. Democracy is limited to the elections and polls and this statistical and formal aspect reigns and is all encompassing. The substantive side of the democratic government (eg. rule of law, judicial independence) is at best an after-thought. As put by the former President of the Israeli Supreme Court Aharon Barak: "*when the majority denies the minority human rights, it harms democracy … take majority rule away from constitutional democracy, and you have struck at its very essence. Take the rule of basic values away from constitutional democracy, and you have struck at its very existence*[3]". Barak then continues on a more ominous note: "[…] *if we wish to preserve democracy, we cannot take its existence for granted. if it could happen in the country of Kant and Beethoven, it can happen anywhere*"[4].

Poland has now entered the phase that goes well beyond mere threat to existence of the democracy. Right now, very essence of Polish democratic system of governance is compromised and under attack. Europe should be well aware of the seriousness of the ongoing seismic shift in power and narrative unfolding right now in Poland which goes well beyond packing the Court. Civil society in Poland[5] must brace itself for a huge test and clear alternative: it will either stand up and let its voice be heard that Poland is much bigger and better than PiS *or* quietly and passively accept the narrative imposed on the public discourse by the ruthless majority and the slow concomitant backsliding into authoritarianism. It is to be hoped that the last 25 years of progress and unimaginable institutional and economic success that Poland had witnessed has built Polish citizenry and taught Poles what it means to be responsibly free, to have a limited and predictable government bound by the rule of law, a government that lets people live their own lives, make their own choices and preferences in a diversified and vibrant Poland. The time of constitutional reckoning has indeed arrived.

1 For more detailed analysis see A. Jasiak, *Constitutional constraints on ad hoc legislation. A comparative study of the United States, Germany and the Netherlands*, 2011.

2 *Constitutionalism and the Enlargement of Europe,* 2012, at p. 136.

3 A. Barak, *Judge in a Democracy*, 2008, p. 26.

4 A. Barak, *supra* note 25, at p. 20 – 21

5 Indeed the "grassroots constitutionalism" might be in the making in Poland right now. M. Konopacka makes a good point about the importance of civil activity. She points out that in the wake of the government refusal to publish the judgment of the Court of 3rd of December, people's response was to publish the Court's judgment on social media as part of the bottom-top initiative "*Cała Polska niezwłocznie publikuje wyrok Trybunału Konstytucyjnego*" which in English reads "All Poles publish immediately the judgment of the Court". As a result the judgment is available here. See her comment to my *Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense*.

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